

The appealed Award grants benefits for a 14 percent general body disability based on functional impairment. K.S.A. 44-510e limits disability to the functional impairment in cases where the claimant earns a wage after the injury which is 90 percent or more of the wage he/she was earning at the time of the injury. In this case the ALJ found, based on work claimant performed for respondent after the injury, claimant was able to earn a wage 90 percent or greater than the wage she was earning at the time of the injury and limited the award to the functional impairment. On appeal, claimant contends that as of the last

testimony she gave in this case she was not earning 90 percent of her preinjury wage and is, therefore, entitled to a work disability.

Respondent, on the other hand, contends claimant should be limited to a scheduled injury, the right upper extremity, only. Respondent contends claimant has not proven that she suffered permanent injury to the left upper extremity arising out of and in the course of her employment. In addition, respondent contends claimant failed to give timely notice of injury to the left upper extremity as required by K.S.A. 44-520. If the award is based on a general body injury, respondent advances several arguments for limiting the award to the functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified to a work disability.

Findings of Fact

1. On July 14, 1997, claimant tripped on a mat and fell forward, landing on her hands. Her right hand and arm took most of the weight. At the time claimant was employed by respondent, a temporary employment service, and assigned to Binney & Smith. Claimant was taken to the emergency room and was off work for two days. While working at Binney & Smith, claimant earned \$7.35 per hour and worked overtime.
2. Claimant was seen by Dr. Daniel V. Lygrisse on July 18, 1997. Dr. Lygrisse restricted claimant to work using the left hand only and claimant continued to work at Binney & Smith.
3. Claimant continued to have problems with her right arm and beginning July 23, 1997, claimant received treatment with Dr. Thomas W. Kneidel. Dr. Kneidel saw claimant again August 12, 1997, and at this time ordered nerve conduction tests for claimant's right upper extremity. The tests indicated claimant had mild carpal tunnel syndrome on the right. No testing was ordered for the left arm. After trying conservative treatment, including injections, physical therapy, and a period of two weeks off work, Dr. Kneidel performed a right carpal tunnel release on December 17, 1997. Claimant was off work for 11 weeks following surgery.
4. After the initial accident in July 1997, claimant "babied" her right arm. But from the date of the accident in July 1997 until the surgery in December 1997, claimant's right upper extremity symptoms continued to worsen. Claimant also began to have left side symptoms. Claimant's left side symptoms also worsened up to the time of the surgery done in December for the right side carpal tunnel syndrome.
5. In February 1998, after the right carpal tunnel release, claimant returned to work for respondent and was initially assigned to work for the Salvation Army Thrift Store initially hanging clothes up and then as a receptionist. The symptoms in both her right and her left

upper extremities remained essentially the same after the surgery. She earned initially \$6.35 and later \$6.75 per hour, 40 hours per week with no overtime. It is not clear from the record when the wage changed to \$6.75 per hour. Claimant was then assigned to work for a brief period at K-Square doing assembly line work, work which claimant testified she had difficulty doing, and then again to the Salvation Army. Claimant continued to work for respondent, assigned to the Salvation Army, until December 4, 1998.

6. In December 1998, respondent advised claimant the doctor had released her. Respondent told claimant the assigned job with the Salvation Army had ended but it might be possible to work directly for the Salvation Army. The last day of work for respondent was December 4, 1998. Claimant then worked on a temporary basis directly for the Salvation Army. Claimant's job with the Salvation Army ended December 30, 1998. As a direct employee, claimant earned \$5.50 per hour. She was a full-time employee.

7. After her work for the Salvation Army, claimant did not contact respondent to ask for additional work. But respondent knew the work for the Salvation Army was a three-week assignment. In December 1998, claimant told respondent she would not be interested in the work for the Salvation Army if respondent had some other work for her. Respondent's representative advised her that respondent had only industrial work which claimant could not do.

As of the last testimony, at the Continuation of the Regular Hearing on January 12, 1999, claimant was applying for other work and had applied for unemployment compensation benefits. She was to return to Snyder Clinic for an interview.

8. Dr. Kneidel gave an impairment rating for claimant's right upper extremity, a rating of 10 percent, but did not rate the left upper extremity. Dr. Kneidel found no objective left side symptoms. Dr. Kneidel felt claimant did not cooperate in performing the strength tests he gave her. Dr. Kneidel also did not recommend work restrictions.

9. Claimant was examined by Dr. Pedro A. Murati on March 26, 1998. Dr. Murati diagnosed (1) status post right carpal tunnel release with residual deficits; (2) overuse syndrome in the left upper extremity; (3) right de Quervain's; and (4) probable degenerative joint disease of the right CMC joint in the thumb. He assigned a functional impairment rating of 12 percent of the whole body. Dr. Murati restricted claimant to occasional repetitive hand controls, no heavy grasping, no repetitive grasping, and occasional fine manipulation. He recommended weight limits of 20 pounds occasionally, 10 pounds frequently, and 5 pounds constantly. Dr. Murati agreed with the task loss opinion of Mr. Jerry D. Hardin, an opinion that claimant has a 6 percent loss of ability to perform tasks claimant had performed in the 15 years before the date of the accident.

10. Dr. Peter V. Bieri performed an independent evaluation at the request of the ALJ. His rating was 14 percent for the right upper extremity and 10 percent for the left upper extremity. He recommended restrictions against lifting over 20 pounds for occasional lifting, 10 pounds

for frequent lifting, and recommended negligible constant lifting. He also suggested seizing, holding, grasping, turning or gripping should be performed no more than frequently.

11. Claimant's Application for Hearing, filed with the Division and served on the employer in October 1997, alleges injury to both claimant's left and right upper extremities.

12. In its brief to this Board, respondent stipulated that claimant's average weekly wage at the time of the injury was \$332.08, as found by the ALJ.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1997 Supp. 44-501(a).

2. The Board concludes claimant's injury is an unscheduled or whole body injury. *Depew v. NCR Engineering & Mfg.*, 263 Kan. 15, 947 P.2d 1 (1997). This conclusion accepts as true claimant's testimony that she experienced simultaneous injury to both upper extremities. This conclusion also relies, in part, on the opinion of Dr. Murati and the opinion of Dr. Bieri. Both physicians found impairment in both upper extremities.

3. The Board concludes claimant gave timely notice as required under K.S.A. 44-520. The date of accident in this case would be December 16, 1997, the last date claimant worked before she had carpal tunnel surgery on the right. Claimant did different work when she returned to work after the surgery. *Treaster v. Dillon Companies, Inc.*, Docket No. 80,830 (Kan. 1999). Respondent acknowledges it had notice of injury to the right upper extremity but denies notice to the left. But claimant's Application for Hearing, alleging bilateral injury, was sent in October 1997 and acts as timely notice in this case.

4. The Board concludes claimant is entitled to work disability. The ALJ denied work disability after finding that claimant had shown she was capable of earning a wage which was 90 percent or more of her preinjury wage. But the wage claimant earned after the surgery was not comparable. She did not work overtime. Her hourly wage was initially \$6.35 and then was \$6.75 or \$270 per week. She earned \$5.50 per hour or \$220 per week after she became directly employed by the Salvation Army. The wages were less than 90 percent of her preinjury wage of \$332.08. In addition, the work claimant returned to after the surgery was temporary only. Respondent continued to assign claimant until she was fully released and then advised her they had no work she would be able to do. The next work at the Salvation Army was a three-week job to carry through the holiday period.

5. For a general body disability, claimant is entitled to work disability. K.S.A. 1997 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the

ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

6. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

7. Claimant accepted work offered through respondent and then accepted the temporary position with the Salvation Army. Once she determined respondent was not going to offer additional work, she began looking and applied for unemployment compensation. She had obtained an interview with one employer. The Board concludes claimant was making a good faith effort. As a result, from January 1, 1999, forward the wage loss should be considered to be 100 percent.

8. Claimant had a 12.5 percent work disability for the period from her return to work after surgery while she was making \$6.75 per hour which calculates to a 19 percent wage loss. The Board has not calculated a separate disability for the period claimant's wage was \$6.35 per hour because the record does not show how long she was at that wage and this would be claimant's burden. In all likelihood, it would make no difference in the benefits. The 19 percent wage loss is averaged with the 6 percent task loss to arrive at the 12.5 percent work disability. K.S.A. 44-510e. As of December 7, 1998, when claimant became a direct employee at \$5.50 per hour, claimant's wage loss became 34 percent and the resulting work disability 20 percent. Once claimant's work ceased December 30, 1998, the wage loss became 100 percent and the work disability 53 percent. K.S.A. 44-510e.

9. The initial 12.5 percent work disability would entitle claimant to 51.88 weeks at \$221.40 per week beginning when she returned to work 11 weeks after the surgery on December 17, 1997. Claimant would be paid the same rate, \$221.40 per week, for the approximately three weeks she worked directly for the Salvation Army in December 1998 and was at a 34 percent disability. The final 53 percent work disability would entitle claimant to 219.95 weeks, less the weeks paid while at the 12.5 percent and while at the 34 percent. As a result, claimant would be entitled to a total of 219.95 weeks at \$221.40 per week beginning 11 weeks after December 17, 1997.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes on July 30, 1999, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Linda S. Martin (Jenkins), and against the respondent, Adecco Services, Inc., and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred December 16, 1997, and based upon an average weekly wage of \$332.08, for 11.43 weeks of temporary total disability compensation at the rate of \$221.40 per week or \$2,530.60, followed by 219.95 weeks at the rate of \$221.40 per week or \$48,696.93, for a 53% permanent partial disability, making a total award of \$51,227.53.

As of January 15, 2000, there is due and owing claimant 11.43 weeks of temporary total disability compensation at the rate of \$221.40 per week or \$2,530.60, followed by 97.28 weeks of permanent partial disability compensation at the rate of \$221.40 per week in the sum of \$21,537.79, for a total of \$24,068.39 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$27,159.14 is to be paid for 122.67 weeks at the rate of \$221.40 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steve R. Wilson, Wichita, KS
Douglas C. Hobbs, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director